IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 478 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

REFRIGERATION & APPLIANCES

Versus

JAYABEN BHARATKUMAR THAKKER

Appearance:

MR KAMAL TRIVEDI with MR UDAY JOSHI for M/S TRIVEDI & GUPTA ADVOCATES for Petitioner No. 1-6

MR YN OZA WITH MR BP GUPTA for Respondent No. 1

..... for Respondent No. 2-3

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 06/07/2001

ORAL JUDGEMENT

Heard Mr. Kamal Trivedi learned advocate with Mr. Uday Joshi learned advocate for M/s. Trivedi and Gupta Advocates on behalf of petitioners.

2. Rule. Mr. Y.N.Oza learned Senior advocate appearing with Mr. B.P.Gupta learned advocate on behalf of respondents has waived service of rule. By consent of parties, petition is taken up for final hearing.

3. The petitioners have challenged the order dated 17.4.2001 passed by learned 3rd Joint Civil Judge (S.D.), Vadodara below Exh.42 in the proceedings of Special Civil Suit No. 212 of 1999.

That vide impugned order, the Trial Court has dismissed the application Exh.42 of the present petitioners and has passed the further order directing both the parties to proceed with arguments of Exh.15, Exh.27 and Exh.5.

4. The respondent no.1 has filed Special Civil Suit No. 212 of 1999 dated 26.2.1999 against the present petitioners and respondent nos. 2 and 3 in the Court of learned Civil Judge (S.D.), Vadodara with a prayer to claim declaration, permanent injunction and taking accounts of the partnership firm and has also moved application Exh.5 with a prayer of temporary injunction as prayed in para.24 of the said application. That the suit is based on partnership deed dated 7.2.1973.

The present petitioners as defendants of the said suit appeared in the proceedings of Special Civil Suit No. 212 of 1999 and contended vide application Exh.15 dated 4.3.1999 that the subject matter of the suit is liable to be determined by arbitration. That vide order dated 30.7.1999, the Trial Court dismissed the said application Exh.15 of the present petitioners; against which the petitioners preferred Civil Revision Application No. 1314 of 1999 before this Hon'ble High Court. That vide order dated 4.11.1999, this Court rejected said civil revision application and thereby, the present petitioners preferred Civil Appeal No. 2662 of 2000 arising out of S.L.P. (C) No.217 of 2000 in the Hon'ble Supreme Court. That the Hon'ble Supreme Court vide order dated 17.4.2000 allowed the said appeal setting aside the impugned order of the Trial Court as well as order of this Hon'ble High Court in Civil Revision Application No. 1314 of 1999 and remanded the matter to the Trial Court with a direction to club the application Exh.15 dated 4.3.1999 filed by these petitioners along with another application Exh.27 filed by present petitioners dated 16.11.1999 for deciding the same in accordance with law on merits. The Trial Court is also directed to dispose of other pending applications

according to law on merits.

5. The petitioners presented application Exh.42 before the Trial Court and prayed that Arbitration Application Exh.15 dated 4.3.1999 and Exh.27 dated 16.11.1999 only (emphasis supplied) be ordered to be heard as per the order of Hon'ble Supreme Court. That after hearing application Exh.42, the Trial Court dismissed the application Exh.42 vide impugned order and gave direction to the parties to proceed further with the application not only Exh.15 and Exh.27, but also with application Exh.5 which was pending on record.

6. It has been submitted at bar on behalf of petitioners that Trial Court has misconstrued the direction of the Hon'ble Supreme Court and has erroneously directed the parties to proceed further with pending application Exh.5 along with Exh.15 and Exh.27 which is contrary to the prayer made by the petitioners vide application Exh.42. It is submitted that applications Exh.15 and Exh.27 are in respect to direction to the parties under Section 8 of the Arbitration and Conciliation Act,1996; to refer the suit dispute to the Arbitrartors in terms of arbitration agreement contained in the partnership deed executed by the parties and unless said applications are decided, the Court could not invoke powers under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") to hear application for interim relief and pass any order on Exh.5 of the suit. Thus, impugned order as passed being in illegal exercise of jurisdiction; interference of this Court is warranted.

7. It is also submitted on behalf of petitioners that the Trial Court has misconstrued the observations made by the Hon'ble Supreme Court in the matter of M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd. reported vide AIR 1999 SC 565 inasmuch as; the facts situation involved in the said reported matter is radically different then the facts situation involved in the present matter and thereby also, interference of revisional court is necessary.

8. On behalf of respondents Mr. Y.N.Oza learned Senior advocate has submitted that the Trial Court with a view to expedite the hearing of the pending proceedings has rightly directed to the parties to proceed further with the hearing of applications Exh.15, Exh.27 and Exh.5 together. That the Trial Court intended to dispose of the pending applications along with the application for interim relief filed by the present respondent as

plaintiff of the suit; as the respondents / plaintiffs had apprehension that present petitioners/defendants intended to prolong the proceedings under the guise of hearing of various applications Exh.15 and Exh.27 etc. and were giving further application for interim relief in the proceedings of the suit. That thereby, the impugned order being just, proper and reasonable, no interference is warranted.

9. It would be pertinent to note that jurisdiction to grant interim relief in a pending suit under Order 39 of the Civil Procedure Code and jurisdiction to grant interim relief under Section 9 of the Act before or during arbitral proceedings or at any time after the making of the arbitral award, but before it is informed in accordance with Section 36 of the Act, are different and distinct in nature and content; because Section 5 of the Act creates a bar for the Court as judicial authority to intervene in the matter except as provided in Part-I of the Act. That thereby, Court cannot exercise such jurisdiction simultaneously in a proceedings of suit without determining the question whether the suit dispute is required to be determined by arbitration.

It is true that in the matter of M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd. reported vide AIR 1999 SC 565, the Hon'ble Supreme Court has elaborated the proposition that Court can grant interim relief under Section 9 of the Act even before commencement of arbitral proceedings. However, the Hon'ble Supreme Court has also stated that Court can grant interim relief under Section 9 of the Act in a fact situation where party claiming the interim relief has manifest intention by making averments in the application that the applicant intends to refer the dispute to arbitration in due course.

10. In the instant case, as per the allegations of the petitioners/defendants, the respondnets/plaintiffs have resorted to proceedings of Civil Suit No. 212 of 1999 not only in disregard of arbitration agreement between the parties to refer the suit dispute for Resolution by arbitration, but have contested the application made by the respondents/plaintiffs vide Exh.15 and Exh.27 under Section 8 of the Act to refer the suit dispute for Resolution by arbitration. That in the context of said factual controversy, the Hon'ble Supreme Court has remanded the matter to the Trial Court with a direction to decide applications Exh.15 and Exh.27 in accordance with law on merits, and has also directed to decide all other pending applications.

That while dismissing the application Exh.42, vide impugned order the Trial Court has misconstrued the provisions of Section 9 of the Act and has directed the parties to proceed further with the arguments of applications Exh.15, Exh.27 and also Exh.5 which is an application for interim relief in a pending suit. Not only that, the Trial Court has also misconstrued the observations made by the Hon'ble Supreme Court in the matter of M/s. Sundaram Finance Ltd. (supra).

11. That the Hon'ble Supreme Court has made following observations in para.20 in the matter of M/s. Sundaram Finance Ltd. (Supra) which are material and relevant :

"When a party applies under Section 9 of the 1996 Act it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen which is referable to the arbitral tribunal. Section 9 further contemplates arbitration proceedings taking place between the parties. Mr. Subramaniam is, therefore, right in submitting that when an application under Section 9 is filed before the commencement of the arbitral proceedings there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings if , at the time when the application under Section 9 is filed, the proceedings have not commenced under Section 21 of the 1996 Act. In order to give full effect to the words "before or during arbitral proceedings" occurring in Section 9 it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party before an application under Section 9 can be filed. The issuance of a notice may, in a given case, be sufficient to establish the manifest intention to have the dispute referred to arbitral tribunal but a situation may so demand that a party may choose to apply under Section 9 for an interim measure even before issuing a notice contemplated by Section 21 of the said Act. If an application is also made the Court will first have to be satisfied that there exists a valid arbitration agreement and the applicant intends to make the dispute to arbitration. Once it is so satisfied the Court will have the jurisdiction to pass orders under Section 9 giving such interim protection as the facts and circumstances warrant. While passing such an order and in order to ensure that

effective steps are taken to commence the arbitral proceedings, the Court while exercising jurisdiction under Section can pass conditional order to put the applicants to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings. What is apparent, however, is that the Court is not debarred from dealing with an application under Section 9 merely because no notice has been issued under Section 21 of the 1996 Act."

12. On the basis of foregoing discussion, present petition is allowed. The impugned order passed below Exh.42 is hereby quashed and set aside. The Trial Court is directed to proceed further with the hearing of pending applications Exh.15 and Exh.27 only forthwith and after deciding the same, if necessary, shall proceed to hear application Exh.5 in accordance with law on merits. Rule to that extent is made absolute.

At this stage, Mr. B.P.Gupta learned advocate for the respondents has requested to defer the operation and implementation of the above stated order for a period of two weeks so as to enable the respondents to approach the higher forum. In the facts and circumstances of the case and in view of the order of Hon'ble Supreme Court dated 17.4.2000 as referred to in the order, it would not be just and proper to defer the operation and implementation of the above stated order and hence, prayer is rejected.

(A.K.Trivedi,J.)

(vipul)